ncta
The Internet & Television Association
25 Massachusetts Avenue, NW | Suite 100
Washington, DC 20001
(202) 222-2300

Rick Chessen
Senior Vice President,
Law and Regulatory Policy
o (202) 222-2445 e rchessen@ncta.com

November 8, 2017

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: GN Docket No. 16-142; MM Docket Nos. 14-50, 09-182, 07-294, 04-256, MB Docket Nos. 17-290, 17-105

Dear Ms. Dortch,

On November 6, 2017, Rick Chessen, Michael Schooler, and Diane Burstein of NCTA — The Internet & Television Association ("NCTA"), met separately with Kate Black, Policy Advisor, Media, to Commissioner Rosenworcel and with Nirali Patel, Acting Legal Advisor for Media to Commissioner Carr, and on November 7, 2017, met separately with Brooke Ericson, Chief of Staff to Commissioner O'Rielly, and Alison Nemeth, Media Advisor to Chairman Pai, regarding the draft orders circulated in the above-captioned proceedings.

Broadcast Ownership

Regarding the broadcast ownership proceeding, we discussed proposed changes to the "top four" prohibition in the Commission's "duopoly rule."[1] We noted that current law and the Commission's rules bar joint retransmission consent negotiations except by stations that are directly or indirectly under common de jure control. Thus, the pending "hybrid" approach to the "top four" prohibition, under which a party could seek approval of a proposed combination of two "top four" stations in the same market,[2] could have the effect of allowing joint

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1 *See* 47 C.F.R. § 73.3555(1)(i) (restricting an entity's ownership of two television stations licensed in the same Designated Market Area ("DMA") if, *inter alia*, both stations are ranked among the Top Four stations).

2 *See 2014 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 14-50, Order on Reconsideration and Notice of Proposed Rulemaking, FCC-CIRC1711-06, ¶¶ 66-85 (rel. Oct. 26, 2017) ("*Media Ownership Circulation Order*").

retransmission consent negotiations by two such stations. We pointed out that the Commission has found such joint negotiations to be anticompetitive and harmful to consumers[3] and there is nothing to the contrary in the record of these proceedings. Given this uncontroverted determination of harm, we argued that the Commission may not modify the duopoly rule in a way that permits such joint negotiations without first addressing the reasons for the rule change and providing factual record support to justify a new finding about the effects of joint negotiations.[4]

If the Commission nevertheless decides to adopt the proposed "hybrid" case-by-case approach, it should modify its rule barring joint retransmission consent negotiations to extend that rule to any combination of commonly owned "top four" stations that may be allowed under that approach. Section 325(b) gives the Commission broad authority over the manner in which broadcasters exercise their retransmission consent rights.[5] We explained that modifying the duopoly rule without also revising the joint retransmission consent negotiation rules would expose consumers to the very harms that both Congress and the Commission sought to prevent.[6]

If the Commission does not expressly extend the ban on joint negotiations to commonly owned "top four" stations, we argued that it should expand the list of criteria in its case-by-case examinations[7] to include the impact of any proposed combination on retransmission consent. We explained that, particularly since the Commission has already recognized the harmful impact

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3 *2014 Retransmission Consent Order*, 29 FCC Rcd 3351, 3357-58 ¶ 10 ("joint negotiation among any two or more separately owned broadcast stations serving the same DMA *will invariably tend to yield retransmission consent fees that are higher than those that would have resulted if the stations competed against each other in seeking fees*" (emphasis added)); *id.* at 3358 ¶ 10 ("With regard to Top Four broadcasters, we can confidently conclude that the harms from joint negotiation outstrip any efficiency benefits identified and that such negotiation on balance hurts consumers." (footnote omitted)). *See also id*., 29 FCC Rcd at 3362 ¶ 16 & n. 66 (stating that data filed in the record "lends support to our conclusion that joint negotiation between or among separately owned, same market Top Four stations leads to supra-competitive increases in retransmission consent fees," citing evidence showing that joint negotiations increased fees by 20 percent or more (up to 43 percent)).

4 *See FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009). When an agency reverses a prior action, it is required to acknowledge that it is changing position, show good reasons for the new policy, and provide a reasoned explanation for its action. *Id*. Where, as in this case, an agency's new policy rests upon factual findings that contradict those which underlay its prior policy, the agency "must provide a more detailed justification than would suffice for a new policy created on a blank slate." *Id*. As the Court explained, in such cases "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id*.

5 47 U.S.C. § 325(b)(3)(C) (granting the Commission the ongoing authority to "revise" its regulations governing "the exercise by television broadcast stations of the right to grant retransmission consent").

6 The bar on joint negotiations should extend to the joint negotiation of retransmission consent for a second network feed via a multicast stream. Although the Commission has not applied the local ownership rules to the multicast of two "top four" network signals as a general matter, allowing a single owner to jointly negotiate retransmission consent for two "top four" network signals creates the same risk of consumer harm regardless of whether the combination arises from dual ownership or dual affiliation.

7 *See Media Ownership Circulation Order* ¶ 82.

of joint negotiations by two "top four" stations, the Commission may not effectively allow such joint negotiations by authorizing "top four" combinations without taking such harm into account.

Finally, we noted that if the Commission ultimately – and unwisely – approves the common ownership of two "top four" stations and permits joint retransmission consent negotiations, it must adopt safeguards to address the increased likelihood of negotiation abuses resulting from these changed circumstances. We noted that other commenting parties had identified possible safeguards that the Commission might consider in these circumstances.

ATSC 3.0

Regarding the draft order authorizing permissive use of a new broadcast television standard (*i.e.*, ATSC 3.0), we reiterated our overriding view that the Commission must ensure that the broadcasters' voluntary roll-out of ATSC 3.0 does not disrupt consumers or impose costs and burdens on cable operators and their customers. To that end, we continued to urge that the Commission require robust simulcasting requirements during the transition period – requirements that should not at this time have any arbitrary expiration date and should be maintained until the Commission affirmatively determines in a future proceeding that they should be lifted.

The simulcasting rules should include a requirement that the broadcaster's ATSC 1.0 signal continue to be transmitted in the same format as before the transmission of the companion ATSC 3.0 signal. Over-the-air viewers should not be required to purchase new TV sets (assuming they are even available) to continue watching HD and other high-quality programming that they enjoy today, and cable operators should not be required to make costly arrangements to obtain for their customers the HD signals currently transmitted over the air.

We also reiterated that the simulcast stream must continue to serve the same coverage area and community of license from a "host" station as it did prior to the launch of the ATSC 3.0 signal on its regularly assigned channel. Broadcasters misleadingly claim that during the transition to digital broadcasting the Commission only required broadcasters to cover their communities of license rather than replicate their analog service areas. NAB neglects to mention some key facts. First, in the DTV transition, the FCC allotted broadcasters second channels for DTV operation that best matched the Grade B contour of the analog station with which it was paired.[8] Broadcasters make no such commitment to match their current coverage areas here. Second, the FCC's decision not to require replication was *temporary*. The Commission adopted "use or lose" replication requirements, meaning that to the extent that broadcasters *failed* to replicate their analog service area they would *lose interference protection for unreplicated* areas and other broadcasters could expand into those areas: "By losing such protection, other broadcasters will be free to maximize their service areas, or to expand the service area of existing

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[8] *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 19 FCC Rcd 18279 at ¶ 72 (2004) ("We took this approach to ensure that broadcasters have the ability to reach the audiences that they have been serving with the NTSC analog transmission system and that viewers continue to have access to the stations that they are accustomed to receiving over the air.").

full or low-power stations, in order to restore any service lost by viewers as a result of the lack of full replication."[9] Neither the broadcasters nor the Commission have proposed any such mechanism for restoring lost ATSC 1.0 service to viewers abandoned by their current stations here.

We also noted our concern regarding statements made during a recent earnings call by Sinclair CEO Chris Ripley on Sinclair's 3.0 patent holdings.[10] During that call, Mr. Ripley stated that the process of determining the value of those patents "has just gotten underway." He went on to say that while MPEG LA has organized some initial meetings regarding a possible ATSC 3.0 patent pool:

> Our patents are still literally getting issued. It seems like every week, one comes through the door. We're newbies to this process. We didn't do the 3.0 work to gain a revenue stream. That's just sort of a happy outcome of pushing a standard that we thought would benefit the access that we hold in the industry at large. [Financially] there will be something that comes out of that and we have hired experts to help us through this process.[11]

Those are not the words of a patent holder expressing a recognition that any patents bearing on a government-mandated standard must be licensed on a reasonable and non-discriminatory (RAND) basis.

Finally, we stressed that, given the substantial complexity and costs for MVPDs to carry ATSC 3.0 signals (costs ultimately borne by consumers), the Commission should make clear that it will scrutinize efforts by broadcasters to obtain premature carriage of ATSC 3.0 by unreasonably withholding access to ATSC 1.0 signals.

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[9] *Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television,* Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 5946 ¶ 22 (2001).

[10] *See* Communications Daily, Thursday, November 2, 2017.

[11] *Id*.

Form 325

With respect to the draft order proposing to eliminate or streamline the FCC's Form 325 data collection, we urged the Commission to suspend the filing deadline for currently-outstanding Forms 325 pending resolution of the issues raised in the soon-to-be issued Notice of Proposed Rulemaking.

Respectfully submitted,

/s/ Rick Chessen

Rick Chessen

cc: Kate Black
Nirali Patel
Brooke Ericson
Alison Nemeth